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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 UNITED STATES OF AMERICA,) CASE NO. CR00-283-MJP
09 Plaintiff,)
10 v.) SUMMARY REPORT OF U.S.
11 SHAWN MICHAEL LUNDY,) MAGISTRATE JUDGE AS TO
12 Defendant.) ALLEGED VIOLATIONS
OF SUPERVISED RELEASE
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14 An evidentiary hearing on supervised release revocation in this case was scheduled before
15 me on February 17 and 18, 2010. The United States was represented by AUSA Adam Cornell
16 and the defendant by Gabriel I. Banfi. The proceedings were digitally recorded.

17 Defendant had been sentenced on or about December 15, 2000 by the Honorable Marsha
18 J. Pechman on charges of Manufacturing Marijuana and Money Laundering, and sentenced to
19 120 months custody, 5 years supervised release. (Dkt. 64.)

20 The conditions of supervised release included the standard conditions plus the
21 requirements that defendant be prohibited from possessing a firearm or destructive device, submit
22 to drug testing, abstain from alcohol, participate in a substance abuse program, submit to search,

01 participate in a mental health program, provide access to financial information, be prohibited
02 from incurring new credit obligations or lines of credit, obtain preapproval for all employment
03 and provide his probation officer with regular pay stubs, and cooperate with the Internal Revenue
04 Service in the determination and payment of all taxes.

05 Defendant's term of imprisonment was reduced to 90 months on July 9 , 2007. All other
06 terms and conditions of the Judgment remained in effect. (Dkt. 79.)

07 Following an arrest of defendant in Arlington, Washington for driving under the influence
08 on July 26, 2008, the conditions of supervision were modified to require defendant to participate
09 in a home confinement program with electronic monitoring for 120 days and to prohibit
10 defendant from entering any establishment where alcohol was the primary commodity for sale.
11 (Dkt. 80.)

12 In an application dated January 7, 2010 (Dkt. 81, 82), U.S. Probation Officer Steven R.
13 Gregoryk alleged the following violations of the conditions of supervised release:

14 1. Committing the criminal offense of possession of marijuana on January 7, 2010,
15 in violation of the standard condition of supervision ordering that he not commit another federal,
16 state, or local crime.

17 2. Committing the criminal offense of possession of drug paraphernalia on January
18 7, 2010, in violation of the standard condition of supervision ordering that he not commit another
19 federal, state, or local crime.

20 3. Associating with convicted felons on January 7, 2010, in violation of standard
21 condition 9.

22 In an application dated January 13, 2010 (Dkt. 90, 91), U.S. Probation Officer Steven R.

01 Gregoryk alleged an additional violation of the conditions of supervised release:

02 4. Committing the crime of Theft 1, on or about January 7, 2010, in violation of the
03 general condition that he not commit another federal, state or local crime.

04 In an application dated January 20, 2010 (Dkt. 92, 93), U.S. Probation Officer Steven R.
05 Gregoryk alleged an additional violation of the conditions of supervised release:

06 5. Committing the crime of Possession of Stolen Property 1, on or about January 7,
07 2010, in violation of the general condition that he not commit another federal, state, or local
08 crime.

09 Defendant was advised in full as to those charges and as to his constitutional rights, and
10 requested an evidentiary hearing before a Magistrate Judge (Dkt. 89). The hearing was held on
11 February 17 and 18, 2010, at which time testimony was taken, exhibits were admitted into
12 evidence, and the argument of the parties was considered (Dkt. 97, 98). The government moved
13 to dismiss violations 1, 2 and 3 at the commencement of the evidentiary hearing. The matter is
14 now ready for decision.

15 **Findings of Fact and Recommendations**

16 I find that the government has not established by a preponderance of the evidence that
17 defendant has violated the conditions of supervised release as alleged in violation 4.

18 *Committing the Crime of Theft 1 on or before January 7, 2010*

19 The conditions of supervise release provide that "The defendant shall not commit another
20 federal, state or local crime." (Dkt. 64 at 3.) Defendant is alleged to have been involved in a
21 fraud scheme involving the Lowe's Home Improvement stores. In support of this allegation, the
22 United States offered the testimony of Jonathan Graham, the regional loss prevention manager

01 for Lowe's, as well as the testimony of Detective David Startup of the Washington State Patrol,
02 Investigative Services Bureau.

03 Mr. Graham testified that in August 2008 he was present at an interview of Michael John
04 Suryan (Ex. 1), who had been arrested previously on a traffic stop and whose vehicle was found
05 to contain several fraudulent Alaska drivers licenses in the name of various individuals with Mr.
06 Suryan's photograph, as well as Lowe's UPC labels and sales receipts.¹ Mr. Suryan told Mr.
07 Graham and Detective Startup, that he and others, directed by the defendant, would purchase
08 various inexpensive items from a Lowe's store, scan the UPC labels from the items and produce
09 a number of duplicate labels, then re-enter the store and affix false, lower priced UPC labels on
10 more expensive items and purchase those items at the fraudulently lowered price. They would
11 then remove the false UPC label, and return the items for refunds at the correct, higher price.
12 The refunds were paid in the form of Lowe's gift cards. Suryan told Mr. Graham and Detective
13 Startup that the scheme required the utilization of fake identification documents such as drivers'
14 licenses, because Lowe's had a limit on the number of returns that could be made per person
15 without a valid receipt, and so they had to assume different identities during the course of the
16 scheme. Suryan said that the defendant would then use the gift cards to purchase other
17 merchandise from Lowe's, and would also use fake Lowe's receipts and the false Alaska drivers
18 licenses to obtain other refunds or merchandise. (See Ex. 1.)

19 The government introduced six photographs into evidence (Exs. 20-25) showing an
20 individual returning merchandise and obtaining gift cards at a Lowe's store in Arlington,
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22 ¹ Mr. Suryan did not testify. The government indicates that efforts to locate Mr. Suryan
in order to serve him with a subpoena were unsuccessful.

01 Washington. Also introduced into evidence were exhibits consisting of the "electronic journal"
02 for the cash register station for each transaction shown in these photographs². (Exs. 6, 8, 10, 12,
03 14, 16) The electronic journals show that merchandise was purchased with merchandise/gift
04 cards. Mr. Graham testified that he believes the individual in the photographs is the defendant.
05 The government produced records showing that the gift cards returned by the individual depicted
06 in the photographs (Exs. 20-25) were originally issued in the names of various individuals, some
07 of whom were real persons and some of whom were fictitious. (Ex. 5, 7, 9, 11, 13, 15) Mr.
08 Graham admitted that the defendant was not seen using false identification documents in the
09 store, or affixing the false UPC labels to products. He indicated that the defendant, when
10 questioned, denied the fraud and asserted that he bought the gift cards on Craig's List.

11 The defendant became the focus of this fraud investigation after Mr. Suryan identified
12 him as the ringleader of the operation. Mr. Suryan made no mention of the defendant's
13 involvement at the time of the August 2008 traffic stop, but did so several months later, in
14 December 2008, when he was arrested after attempting a UPC label switch at a Lowe's store in
15 Vancouver, Washington. At that time, Mr. Suryan indicated that he had been involved in the
16 fraud scheme with defendant for the previous two years, although Detective Startup conceded
17 that the defendant had been in custody through 2007.³ Mr. Suryan has a prior conviction for
18 possession of a controlled substance.

19 The only direct evidence linking the defendant to the refund fraud scheme is Mr. Suryan,
20 who did not appear at hearing. When first arrested, Mr. Suryan did not mention the defendant's

21 ² The handwritten notes on these exhibits were not admitted into evidence.
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01 involvement, but only did so several months later when arrested himself for attempted refund
02 fraud. Although Mr. Suryan told Mr. Graham and Detective Startup that he and the defendant
03 had been involved in the scheme for two years, the government does not dispute the defense
04 contention that the defendant was still in custody during part of this time. Although Mr. Graham
05 asserts that he is able to identify the defendant as the individual making purchases at Lowe's
06 (Exs. 20-25), this Court is not persuaded that the photographs are of sufficient quality to permit
07 this conclusion. Furthermore, even if the defendant were the individual shown in the
08 photographs, that fact would not necessarily contradict the defendant's assertion that he had
09 purchased the gift cards on Craig's List.

10 When the defendant was released from custody to begin his term of supervised release,
11 he resided in Arlington, Washington on property owned by Mrs. Roberta Derosier. A business
12 called "Doggy Day Care" was also located on the property, in a different building. The
13 government introduced photographs taken at Doggy Day Care of scanners, computers, ink jet
14 printers and duplication materials. (Exs. 3 and 4.)The government contends that the presence
15 of this equipment corroborates the defendant's involvement in the fraud scheme. However, Mrs.
16 Derosier, the defendant's landlady, testified that she owns and operates the Doggy Day Care
17 business, and the equipment is owned by her and used in the business. The government did not
18 introduce any evidence that would contradict Mrs. Derosier's assertion.

19 Taken as a whole, the evidence as presented at the evidentiary hearing does not satisfy
20 the government's burden of proving by a preponderance of evidence that defendant committed
21 the crime of Theft 1 on or before January 7, 2010. I recommend the Court dismiss alleged
22 violation 4.

01 *Committing the Crime of Possession of Stolen Property on or before January 7, 2010*

02 I also find that the government has not established by a preponderance of the evidence
03 that defendant has violated the conditions of supervised release as alleged in violation 5. The
04 government's case poses similar deficiencies as with alleged violation 4.

05 This particular alleged violation is based on the government's contention that the
06 defendant participated in the theft of a generator valued at approximately \$17,500 from an
07 individual named James Dolan. (Exs. 18, 19) The defendant's potential involvement in this theft
08 came to the attention of Detective Michael Phillips of the Arlington Police Department during
09 the course of a different investigation of an individual named Eric Sykes for burglaries at a local
10 lumber company. Detective Phillips obtained an arrest warrant for Mr. Sykes in connection with
11 those burglaries and took him into custody. During the arrest, Detective Phillips foiled an
12 attempt by Mr. Sykes to inject himself with heroin before being taken into custody. A pawn shop
13 receipt was found on Mr. Sykes for property belonging to his stepfather, which he had taken and
14 pawned without permission. Mr. Sykes' parents told Detective Phillips that their son had tried
15 to commit suicide several days previously and was currently "dope sick".

16 While questioned by Detective Phillips, Mr. Sykes implicated the defendant in the theft
17 of the above-described generator, currently located on Mr. Sykes' property. Sykes told Detective
18 Phillips that the defendant had asked him on several occasions to assist in stealing a generator
19 for the defendant to use on his property in case of a loss of electrical power. Then, one day, the
20 defendant came by with a generator mounted on a trailer and dropped it off at Sykes' property
21 and asked to store it there. Sykes assumed, but was not told, that the generator was stolen. After
22 the generator was on the property for about a month, the defendant asked Sykes to paint it "to

01 make it blend in better at the Doggy Day Care". Mr. Sykes⁴ testified that he was "dope sick and
02 throwing up" when the generator arrived at his property, and was dope sick and partially high,
03 coming down from heroin, at the time he signed his witness statement. (Ex. 17.) At the time of
04 the evidentiary hearing, Mr. Sykes testified that he had been clean and sober for 35 days.

05 Mr. Sykes' testimony is the only evidence connecting the defendant to the theft of the
06 generator. Mr. Sykes has a significant substance abuse problem, and his written statement is
07 inculpatory of his involvement in the lumber theft scheme. The stolen generator was found on
08 his property. His testimony that the defendant brought the generator to his property is
09 contradicted by the written statement of his mother, who declared under penalty of perjury that
10 Mr. Sykes brought it there. (Ex. A-1.)

11 Taken as a whole, the evidence as presented at the evidentiary hearing does not satisfy
12 the government's burden of proving by a preponderance of evidence that defendant committed
13 the crime of Possession of Stolen Property 1 on or before January 7, 2010. I recommend
14 the Court dismiss alleged violation 5.

15 Summary

16 The government concedes that the defendant would not be convicted of these offenses
17 if proof were required beyond a reasonable doubt, but argues that the evidence satisfies the lesser
18 preponderance of the evidence standard. This Court disagrees. I recommend that violations 1,
19 2, and 3 be dismissed upon motion of the government, and that the Court dismiss violations 4
20 and 5 as not proven by a preponderance of the evidence.

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22 ⁴ Sykes testified that he agreed to cooperate in exchange for immunity for prosecution for
the state charges. He has one misdemeanor conviction for solicitation of a controlled substance.

01 Pending a final determination by the Court, defendant has been detained.

02 DATED this 2nd day of March, 2010.

03 

04 Mary Alice Theiler
05 United States Magistrate Judge

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07 cc: District Judge: Honorable Marsha J. Pechman
08 AUSA: Adam Cornell
09 Defendant's attorney: Gabriel I. Banfi
10 Probation officer: Steven R. Gregoryk
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